

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates	YES/NO



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

**CASE NUMBER: 1835/2020**

In the matter between:-

**PLATINA MOTOR GROUP (PTY) LTD** Applicant/Defendant

and

**TAC DIGITAL SOLUTIONS (PTY) LTD** Respondent/Plaintiff

*This judgement is handed down electronically via e-mail to the parties' legal representatives. The date of hand down is deemed to be **27 June 2024***

**JUDGMENT**

**FMM REID J**

**Introduction:**

[1] This is an application to rescind and set aside a default judgment granted against the applicant / defendant (TAC Digital Solutions) in favour of the respondent / plaintiff

(Platina Motor Group) on 15 August 2022 in the amount of R1,096,988.30 (One Million Ninety-Six Thousand Eighty-Eight Hundred Rand and Thirty Cents) by this Court. The amount is calculated based on an outstanding invoice in the amount of R96,988.30 (Ninety-Six Thousand Eighty-Eight Hundred Rand and Thirty Cents) and damages suffered as a result of loss of income in the amount of R1,000,000.00 (One Million Rand). I will refer to the amount of R1,096,988.30 (One Million Ninety-Six Thousand Eighty-Eight Hundred Rand and Thirty Cents) as “the amount”.

- [2] For ease of reference and identification, when I refer to the specific party I will refer to their names rather than citations.
- [3] This application for rescission of the judgment serves before the same judge that granted default judgment on 15 August 2022. The normal principle is that once a judgment has been granted, it is final and the court that granted it, *is functus officio* **See: National Director of Public Prosecutions v Phillips** (2005) 1 ALLSA 653 (SCA). This normal principle is subject to some exceptions, as set out in Rule 42 of the Uniform Rules of Court (the Rules of Court). Rescission of

court orders is one of the exceptions in terms of which a court may rescind its own order under certain circumstances.

**See: Daniel v President of the Republic of South Africa** 2013 (1) BCLR 1241 (CC) para 5 and **President of the Republic of South Africa and others v South African Rugby Football Union and others** 1999 (4) SA 147 (CC) at para 48.

[4] This application for rescission of the judgment is brought on the basis that the judgment was erroneously sought and/or erroneously granted in the absence of Platina Motors in terms of Rule 42(1)(a). In the alternative, rescission of the judgment is sought in terms of Rule 31(2)(b).

[5] Mr NJ Esterhuyse represents Platina Motors and Adv B Riley represents TAC Digital Solutions.

### **Material factual background**

[6] TAC Digital Solutions issued summons against Platina Motor Group under case number 1374/2020, based upon the same cause of action and on 27 October 2020 that summons was withdrawn by TAC Digital Solutions. A notice of withdrawal

of the action was sent via electronic mail (e-mail) to an employee of Platina Motor Group. It is common cause that the 1<sup>st</sup> summons was issued and withdrawn.

- [7] The 2<sup>nd</sup> summons, which is the applicable summons on which default judgment was granted, was issued against Platina Motors on 13 October 2020. TAC Digital Solutions claimed the amount on the basis of a General Service Agreement and Confidentiality and Non-Disclosure Agreement. Copies of the agreements are attached to the particulars of claim. In the particulars of claim, TAC Digital Solutions plead that Platina Motors committed a material breach in terms of the General Service Agreement, alternatively a material misrepresentation, based upon which Platina Motors cancelled the service agreement. It is disputed between the parties whether TAC Digital Solutions acted in accordance with the dispute resolution clause in the General Service Agreement.

- [8] Service of the summons was done by the Sheriff on 23 November 2020 by affixing a copy of the summons and particulars of claim to the principal door at 7 Korokoro

Avenue, Waterfall East, Rustenburg. It is alleged by TAC Digital Solutions that this address is the chosen *domicilium* address of Platina Motor Group. To the contrary, Platina Motor Group states in paragraph 3.4 of the rescission application that “... *service of the summons was never properly affected in terms of the Uniform Rules of Court at the (Platina Motor Group) address, principle place of business or domicilium address ...*”.

[9] Platina Motor Group also states in paragraph 7.4 of its affidavit that their previous registered address was 6 Korokoro Avenue, Waterval East, Rustenburg. The current registered address as per the CIPC Company report dated 12 December 2022 reflects that the Registered Address and Postal Address is 5 Gareth Roberts Avenue, Waterfall Park, Rustenburg.

[10] The Confidentiality and Non-Disclosure Agreement provide for a chosen *domicilium citandi et execuandi* address, but this agreement is concluded between Platinum Motors and another entity, being VDW Group (Pty) Ltd. Since TAC Digital Solutions was not a party to this agreement, this

*domicilium* address is not applicable to the institution of proceedings between TAC Digital Solutions and Platina Motor Group.

[11] Platina Motor Group states that it first became aware of the default judgment on 6 December 2022, when the Deputy Sheriff of the High Court, Rustenburg, attempted to serve a warrant of execution on Platina Motor Group. The warrant of execution was issued on 24 November 2022.

[12] The defence of Platina Motor Group in the main action, includes that Platina Motor Group lawfully terminated the service agreement based on the common assumption, and express representation, that Ms Leanne van den Berg would be the sole account administrator of Platina Motor Group.

[13] It was further agreed, so Platina Motor Group claims, that Platina Motor Group would be liable for payment of Ms van den Berg's training on the internal programs of Platina Motor Group. This is alleged to be a material misrepresentation as Ms van den Berg left the employment of TAC Digital Solutions shortly after the service agreement was concluded.

[14] The defence is therefore that the contract is void on the basis that the parties elevated the correctness of their assumption to a term of the contract. Platina Motor Group relies on the matters of **Van Reenen Steel (Pty) Ltd v Smith** 2002 (4) SA 246 (SCA) and **Transnet Ltd v Rubenstein** 2005 (3) All SA 425 (SCA) in support of this defence.

### **Condonation**

[15] Platina Motor Group requests condonation from the court for the late filing of the application for the rescission of the judgment. This application for condonation is opposed by TAC Digital Solutions.

[16] As stated, Platina Motor Group first became aware of the judgment on 6 December 2022. The deponent to the affidavit sought legal advice and went to Mozambique for the December holidays from 7 December 2022 to 7 January 2023. The attorneys for Platina Motor Group were granted all the documents that the deponent to the applicant's affidavit had in his possession.

- [17] Correspondence between the parties' legal representatives ensued on 7, 8, 9, 13, 15 December 2022.
- [18] After the attorneys for Platina Motor Group's office opened on 5 January 2023 the applicant's attorneys again corresponded with the respondent's attorney. The attorneys of Platina Motor Group received the last requested documents from their correspondent in Mahikeng on 12 January 2023.
- [19] Also on 12 January 2023, the Deputy Sheriff of the High Court visited Platina Motor Group at 5 Gareth Roberts with a warrant of execution dated 24 November 2012. The warrant of execution had the previous address of Platina Motor Group at 7 Korokoro Avenue Waterfall East Rustenburg, deleted and written in handwriting above that address, the address of 5 Gareth Roberts Waterfall Park, Rustenburg written together with a signature. On 13 January 2023 the Deputy Sherriff returned and attached various movable assets located at the aforesaid address.
- [20] The application for the rescission of the default judgment was



duly served and filed on 17 January 2023.

[21] The attorneys of Platina Motor Group attempted to reach an agreement with the attorneys of TAC Digital Solutions to have the warrant of execution stayed pending the outcome of the rescission application. TAC Digital Solutions was not amenable to such a request and Platina Motor Group successfully launched an urgent application for the stay of execution, which order was granted on 20 January 2023 by Reddy AJ (as he was then known).

[22] The application for condonation is opposed on the basis that it is not in the interest of justice for condonation to be granted.

[23] The following argument is presented in the heads of argument of on behalf of TAC Digital Solutions:

*“39. The application must be made bona fide and not merely to delay. Finally, the existence of a bona fide defence in respect of which the applicant, prima facie, has some prospect of success. A probability of success is not required, a trial issue will suffice.*

*40. It is appropriate to approach the application*

*regarding the requirements of Rule 27 and Rule 31(2)(b) in an integrated manner. This entails the exercise by the Court of a wide discretion upon consideration of all the relevant circumstances.*

41. *The facts as they appear from the papers demonstrate in no uncertain terms that the applicant was aware of legal proceedings against it and provides the applicant provides ambiguous reasons for not entering an appearance to defend.*

42. *It follows that the applicant failed to follow all the necessary steps to establish the reason for the “alleged non-service”, except to the extent that it left the notices with its previous attorney to deal with.”*

(References and footnotes omitted)

[24] In the matter of **Kapp v Minister of Police** (1996) 3 SA 765 (CC) the Constitutional Court held that “*condonation is not for a mere formality for a rubber-stamping exercise, but rather a discretionary relief that must be exercised judiciously.*”

[25] In the matter of **MEC Department of Education, Gauteng province v Governing Body of Rivonia Primary School** (2013) ZACC 6 the Supreme Court of Appeal (SCA) held that “*the granting of condonation is not a foregone conclusion, but rather a discretionary relief that must be granted sparingly and judiciously.*”

[26] In the matter of **Gcaba v Minister of Safety and Security** (2010) ZACC 7 the SCA held that “*condonation is not an automatic right, but rather a discretionary relief that must be granted sparing and judiciously, and only when there is a reasonable explanation for the delay and a bona fide defence to the claim.*”

[27] Platina Motor Group states that the defence it intends to raise, is firstly the merits of the claim in that the contract concluded between the parties were void due to misrepresentation by TAC Digital Solutions. Furthermore, the quantification on the invoice for services rendered and the damages in the form of loss of income in the amount of R1 million, is disputed.

[28] In consideration of the nature of the defences raised by Platina Motor Group, I hold the view that these defences appear to be *bona fide*.

[29] In the premise, I am satisfied that the late institution of the application for rescission is to be condoned.

## The legal position

[30] Rescission of a default judgment is sought under the provisions of Rule 42(1)(a), alternatively Rule 31(2)(b).

[31] These Rules read as follows:

***“31. Judgment on confession and by default and rescission of judgments***

*(1)(a)...*

*(2) (a) ...*

*(b) A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.”*

and

***“42. Variation and rescission of orders***

*(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary—*

*(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.*

*(b) ...”*

[32] In **Ndlovu v Ngcobo** 2016 (3) SA 1 (CC) the Constitutional Court held that ignorance of legal proceedings is not a valid defence for non-compliance with court orders. The court stated that the parties to legal proceedings have a

responsibility to keep themselves abreast of the progress of the matter.

[33] TAC Digital Solutions rely on the fact that Platina Motor Group was aware of the first summons that was issued, and which was withdrawn. On this basis the argument is that Platina Motor Group had an obligation to ensure that it is aware of any further proceedings instituted.

### **Analysis**

[34] In the event where a summons is served on an address that is not the correct *domicilium* address chosen by a defendant, the summons cannot be said to have been served effectively.

[35] Platina Motor Group states that they were not aware of the summons. This results in the proceedings, and the default judgment, being granted irregularly.

[36] As such, the default judgment is to be rescinded and set aside. Having come to this conclusion, it serves no purpose to discuss the legal position of Rule 32 in relation to rescission of orders.

[37] Platina Motor Group is granted an opportunity of 10 (ten) days to enter appearance to defend, and twenty (20) days to file a plea, exception, notice to strike out, with or without a counter-claim.

### **Costs**

[38] The successful party is normally entitled to be remunerated for the cost it incurred in the course of the litigation. Platina Motor Group requests for costs in the event that the application for rescission is opposed.

[39] I find no reason why the normal principles in relation to costs should not be followed.

[40] TAC Digital Solutions should thus pay the costs of Platina Motor Group in this rescission application.

### **Order:**

[41] In the premises I make the following order:

- i) The default judgment granted against the applicant

under case number 1835/2020 is hereby set aside in terms of Uniform Rule 42(a) in that it was erroneously granted in the absence of the applicant.

- ii) Leave is granted to the applicant to defend the action.
- iii) The applicant has to file a notice of intention to defend the action within ten (10) days after receipt of this judgment.
- iv) Thereafter, within twenty (20) days the applicant is to file a plea, exception, notice to strike out with or without a counter-claim.
- v) The cost of this application for rescission is to be paid by the respondent.

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**FMM REID  
JUDGE OF THE HIGH COURT  
NORTH WEST DIVISION MAHIKENG**

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**DATE OF HEARING: 15 FEBRUARY 2024**

**DATE OF JUDGMENT: 27 JUNE 2024**

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**APPEARANCES:**

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